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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

**IN RE CATHODE RAY TUBE (CRT)  
ANTITRUST LITIGATION**

Master File No. 07-5944 SC

MDL No. 1917

**DIRECT ACTION PLAINTIFFS'  
OPPOSITION TO THOMSON SA'S  
MOTION TO DISMISS**

This document relates to:

*Best Buy Co, Inc. v. Technicolor*  
SA, No. 13-cv-05264;

*Siegel v. Technicolor SA*, No. 13-cv-00141;

*Costco Wholesale Corp. v. Technicolor SA*  
(f/k/a Thomson SA) et al., No. 13-cv-05723;

*Electrograph Systems, Inc. v. Technicolor SA*,  
No. 2:13-cv-05724;

*Interbond Corp. of Am. v. Technicolor SA*, No.  
13-cv-05727;

*Office Depot, Inc. v. Technicolor SA*, No. 13-  
cv-05726;

*P.C. Richard & Son Long Island Corp. v.*  
*Technicolor SA*, No. 13-cv-05725

**Judge: Hon. Samuel P. Conti  
Court: Courtroom 1, 17th Floor  
Date: March 7, 2014  
Time: 10 a.m.**

1     *Sears, Roebuck & Co. v. Technicolor SA*, No.  
2     13-cv-05262;

3     *Schultze Agency Services, LLC v. Technicolor*  
4     *SA*, No. 13-cv-05668; and

5     *Target Corp. v. Technicolor SA*, No. 13-cv-  
6     05686.

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1 The Direct Action Plaintiffs (“DAPs”) subject to Defendant Thomson SA’s Motion to  
 2 Dismiss Newly Filed Direct Action Plaintiff Complaints (the “Motion”) [Dkt. No. 2355] submit  
 3 their Opposition to the Motion as follows:

#### 4 **INTRODUCTION**

5 The Court should deny Thomson SA’s motion to dismiss on all counts. First, this Court  
 6 has specific jurisdiction over Thomson SA. Thomson SA was the “biggest seller of televisions”  
 7 in the U.S. throughout the conspiracy period and derived more than half its net sales from the  
 8 U.S., which it considered its “most important market” and where it generated €10.2 billion in  
 9 2002 sales alone. Loh Decl. Ex. V; Rose Decl. ¶¶ 1, 4.<sup>1</sup> Thomson SA exploited this “most  
 10 important market” by participating in a conspiracy whose primary goal was raising and fixing the  
 11 prices of CRTs and CRT Products sold here. Thomson SA was not merely a passive bystander:  
 12 it took part in numerous conspiratorial meetings that specifically targeted the U.S. Thomson SA  
 13 *admitted* its role in this conspiracy in 2011. Best Buy Compl. ¶ 152. Thomson SA’s intentional  
 14 misconduct is more than sufficient to establish minimum contacts with the U.S., and the Court  
 15 therefore has specific personal jurisdiction over this admitted conspirator.<sup>2</sup>

16 In addition, for the reasons stated below, as well as in the DAPs’ opposition to Thomson  
 17 Consumer’s motion to dismiss [Dkt. No. 2377-3], the Court should reject Thomson SA’s  
 18 arguments concerning statute of limitations and laches, as well as its argument concerning  
 19 standing.<sup>3</sup>

#### 20 **FACTUAL AND PROCEDURAL BACKGROUND**

21 Thomson SA is a French corporation with its headquarters located in France. Best Buy  
 22

23 <sup>1</sup> Thomson SA submitted the declarations of Frederic Rose, Adrien Cadieux, Michael O’Hara,  
 24 and Marie-Ange Debon in support of its Motion. *See* Mot. [Dkt. No. 2355], Exs. 2, 3, 5, and 6.

25 <sup>2</sup> On November 25, 2013, Thomson SA filed a motion to dismiss against Sharp that is  
 26 substantially similar to the Motion it has filed against Plaintiffs here. *See* Dkt. No. 2235-3. The  
 27 briefing on Thomson SA’s motion against Sharp is complete. The Court has vacated the hearing  
 28 date and will decide the motion on the papers without oral argument.

<sup>3</sup> The DAPs adopt by reference their more comprehensive discussion of statute of limitations and  
 laches, contained in the DAPs’ Opposition to Thomson Consumer’s Motion to Dismiss [Dkt. No.  
 2377-3] at 13-25; *see also* DAPs’ Opposition to Mitsubishi’s Motion to Dismiss Complaints  
 [Dkt. No. 2358] at 7-25, and their more comprehensive discussion of standing in DAP Tweeter’s  
 Opposition to Toshiba’s Motion to Dismiss [Dkt No. 2245] at 6-12.

1 Compl. ¶ 27; Ex. X at last page; Ex. J at ¶¶ 1, 6; Ex. L at p. 3 of 44; Cadieux Decl. ¶ 4. Now  
 2 known as Technicolor SA (Compl. ¶ 27; Cadieux Decl. ¶ 1), Thomson SA was formerly known  
 3 as Thomson multimedia S.A. and Thomson multimedia. Ex. X at pp. F-7, F-74. Thomson SA  
 4 had multiple wholly-owned subsidiaries, including Thomson Consumer Electronics, Inc.  
 5 (“Thomson Consumer”). *Id.* ¶ 28; Cadieux Decl. ¶ 17. Thomson Consumer is now known as  
 6 Technicolor USA, Inc. (*id.*), and was formerly known as Thomson multimedia, Inc. Cadieux  
 7 Decl. ¶ 17; Ex. X at p. F-75.

8 **I. THOMSON SA WAS MORE THAN A HOLDING COMPANY AND**  
 9 **CONTROLLED THE PRICES OF CRTS SOLD TO CUSTOMERS IN THE**  
 10 **UNITED STATES.**

11 Thomson SA’s motion rests on the fiction that it was merely a holding company and,  
 12 therefore, could not have participated in the CRT conspiracy. Mot. at 1, 3, 4. Yet in its 2011  
 13 Annual Report to shareholders, Thomson SA admitted that it “played a minor role in the alleged  
 14 anticompetitive conduct [regarding CRTs].” Best Buy Compl. ¶¶ 30, 151, 152. And one year  
 15 later, following a four-year investigation, the European Commission fined Thomson SA €38.6  
 16 million for its supposedly “minor” role, finding that the conspiracy “operated worldwide” and  
 17 was “among the most organized cartels that the Commission has investigated.” *Id.*

18 Other evidence further demonstrates that Thomson SA did more than hold the stock of its  
 19 subsidiaries. In a 1997 appellate brief it filed in the Federal Circuit, it described itself as a “large  
 20 multi-national defense and consumer electronics firm with headquarters in France.” Loh Decl.  
 21 Ex. L; *see also* Ex. M (Thomson SA was “the world’s largest supplier of television set-top  
 22 boxes” and had “operational programs”); Ex. Z at pp. 9-10 (listing numerous operations officers  
 23 at Thomson SA); Ex. I at pp. 3, 28 (“[Thomson SA]” signed a letter of intent with the city of  
 24 Foshan, China, to run a jointly owned tube production facility”).

25 Thomson SA also had a controlling role in the finances, policies, and/or affairs of its  
 26 subsidiaries, including Defendant Thomson Consumer, which served the U.S. CRT market. Best  
 27 Buy Compl. ¶ 29. Thomson SA managed Thomson Consumer’s business from its headquarters  
 28 in France, and Thomson SA’s management and board of directors set its policies and direction.  
*Id.*; Ex. J at ¶¶ 1, 6. Thomson SA’s employees also oversaw the U.S. profits and losses

1 associated with Thomson Consumer's high-end and value TV businesses. Best Buy Compl. ¶  
 2 29. Thomson SA further involved itself in planning and purchasing discussions with U.S. CRT  
 3 customers, as it approved the purchases made by U.S. customers. *Id.* It also took part in CRT  
 4 production and pricing discussions relating to CRTs manufactured in Mexico for the North  
 5 American market. *Id.*; [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED] Ex. K at pp. 43-44 ("Our  
 8 Asian plants produce goods for all markets").

9 **II. THOMSON SA PARTICIPATED IN THE CRT CONSPIRACY AND TARGETED**  
 10 **THE UNITED STATES.**

11 Between at least 1995 and 2005, Thomson SA participated in a worldwide conspiracy to  
 12 fix, maintain, and/or stabilize the prices of CRTs sold in the U.S. *See e.g.*, Best Buy Compl. ¶¶  
 13 1, 4, 16, 27, 29, 154. The conspiracy proved extremely successful, affecting "billions of dollars  
 14 of commerce throughout the United States." *Id.* ¶ 7.

15 **A. *Thomson SA participated in meetings in order to raise the price of CRTs and CRT***  
 16 ***products sold in the United States.***

17 Thomson SA and its co-conspirators effectuated the conspiracy through a combination of  
 18 group and bilateral meetings. *Id.* ¶¶ 6, 126, 127, 154. The purpose of these meetings was to  
 19 raise and stabilize the prices and set supply levels of CRTs sold by Thomson SA and its  
 20 competitors in North America, including the U.S. *Id.* ¶ 154. During these meetings, Thomson  
 21 SA and its co-conspirators discussed CRT prices, production, revenues, volumes, demand,  
 22 inventories, estimated sales, plant shutdowns, customer allocation, and new product  
 23 development, including for North American CRTs. *Id.* Examples of these meetings include:

24 [REDACTED]  
 25 [REDACTED]

26 [REDACTED]  
 27 [REDACTED]

28 [REDACTED]

**B. Thomson SA and its co-conspirators fraudulently concealed the conspiracy.**

The DAPs also allege that the conspirators went to great lengths to keep their coordination hidden. Electrograph FAC ¶ 232-246. For example,

**C. Thomson SA directed its anticompetitive conduct at the United States.**

Thomson SA controlled the prices of CRTs sold in the U.S. Best Buy Compl. ¶ 29. A June 2003 email between two Thomson Consumer employees and Christian Lissorgues of Thomson SA, for instance, shows that “all pricing decisions outside of the MYF pricing must be submitted to Mr. Lissorgues, and approved by both Messrs. Lissorgues and Lecoq.” Loh Decl. Ex. W. As the Thomson Consumer employee noted, “[t]he decision regarding pricing deviations beyond the MYF pricing was made at levels above Mr. Lissorgues and myself, thus we must follow our Managements direction with regard to approval of all pricing deviations.” *Id.* The email also attached a spreadsheet that discussed “NAFTA production” in 2003. *Id.*

Likewise,

<sup>4</sup> *see also* Best Buy Compl. ¶ 150 (“The individual participants in the conspiratorial meetings and communications often did not know the corporate affiliation of their counterparts, nor did they distinguish between the entities within a corporate family”).

Other documents similarly highlight Thomson SA's direct involvement in CRT pricing, planning, and operations in the U.S.

***D. Thomson SA participated in the conspiracy to realize massive profits.***

Thomson SA profited handsomely by participating in the conspiracy and targeting its anticompetitive conduct at the U.S. The U.S. was Thomson SA's "most important market" and Thomson SA thrived in it, becoming the "biggest seller of televisions in the U.S." Loh Decl. Ex. N at p. 36; Rose Decl. ¶¶ 1, 4; Loh Decl. Ex. V. In 2002, alone, more than half of its sales – totaling €10.2 billion – came from the U.S. *Id.* U.S. sales also accounted for 55% of its net sales in 1999, 53% of its net sales in 2000, and 53%, of its net sales in 2001. Loh Decl. Ex. N at p. 36; Rose Decl. ¶¶ 1, 4 (approximately 47% of revenues generated from U.S. in 2008).

**ARGUMENT**

**I. THE COURT HAS SPECIFIC PERSONAL JURISDICTION OVER THOMSON SA.**

Section 12 of the Clayton Act confers personal jurisdiction over a defendant for plaintiffs' federal antitrust claims. This section, the long-arm statute for federal antitrust suits, provides: "Any suit, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 15 U.S.C. § 22. The Constitution

1 permits a court to exercise specific personal jurisdiction over a nonresident defendant if the  
 2 defendant has minimum contacts with the forum state such that the exercise of jurisdiction “does  
 3 not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co. v. Washington*,  
 4 326 U.S. 310, 316 (1945). In performing this analysis, the Ninth Circuit applies a three-part test:  
 5 “(1) The non-resident defendant must purposefully direct his activities or consummate some  
 6 transaction with the forum or resident thereof; or perform some act by which he purposefully  
 7 avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits  
 8 and protections of its laws; (2) the claim must be one which arises out of or relates to the  
 9 defendant’s forum-related activities; and (3) the exercise of jurisdiction must comport with fair  
 10 play and substantial justice, i.e., it must be reasonable.” *CollegeSource, Inc. v. AcademyOne,*  
 11 *Inc.*, 653 F.3d 1066, 1076 (9th Cir. 2011). Once plaintiffs satisfy the first two prongs, the burden  
 12 shifts to the defendant to set forth a “compelling case” that the exercise of jurisdiction would not  
 13 be reasonable. *Id.* The Ninth Circuit has adopted a flexible approach that allows plaintiffs to  
 14 make a “lesser showing of minimum contacts ‘if considerations of reasonableness dictate.’”  
 15 *Ochoa v. J.B. Martin & Sons Farms*, 287 F.3d 1182, 1188, n. 2 (9th Cir. 2002).

16 Here, the relevant forum for the Court’s minimum contacts analysis is the U.S. *Go-*  
 17 *Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1989); *Action Embroidery*  
 18 *Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004).

19 ***A. Thomson SA Purposefully Directed its Misconduct at the United States.***

20 The Ninth Circuit applies the “effects test” to determine whether a defendant has  
 21 purposefully directed its misconduct at the U.S. *CollegeSource*, 653 F.3d at 1076. The test  
 22 focuses “on the forum in which the defendant’s actions were felt, whether or not the actions  
 23 themselves occurred within the forum.” *Yahoo Inc. v. La Ligue Contre le Racisme*, 433 F.3d  
 24 1199, 1206 (9th Cir. 2006) (en banc). Thus, purposeful direction occurs where the defendant  
 25 allegedly “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing  
 26 harm that the defendant knows is likely to be suffered in the forum state.” *Id.* at 1077; *In re W.*  
 27 *States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 743-44 (9th Cir. 2013); *Wash. Shoe*  
 28 *Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 673 (9th Cir. 2012). It is enough for a plaintiff to

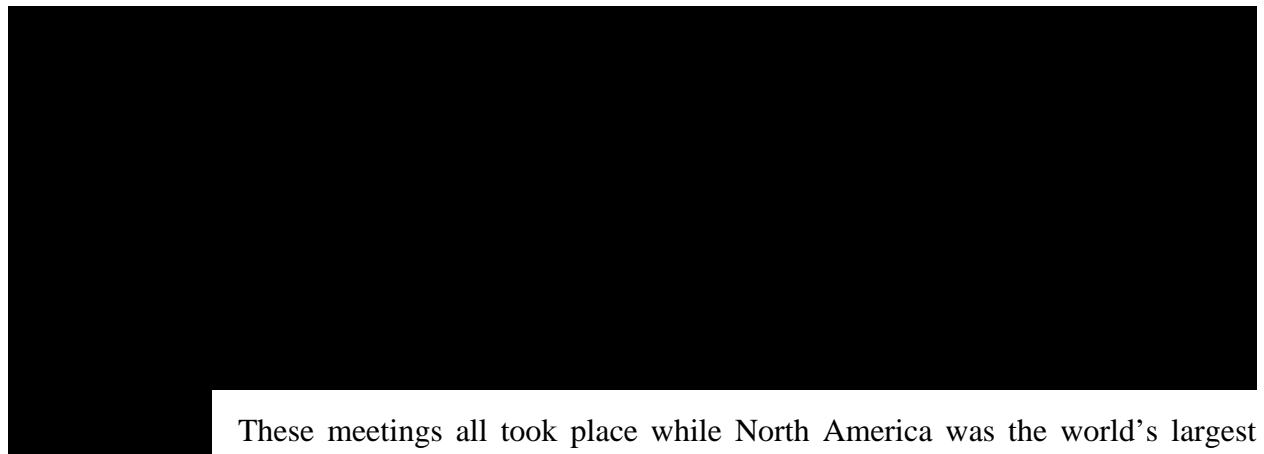
1 assert that a defendant engaged in anticompetitive action that was “intended to have, and did  
2 have” an effect on commerce in the forum. *In re W. States Wholesale*, 715 F.3d at 744.

3 Thomson SA argues that the DAPs cannot establish personal jurisdiction because they do  
4 not specify that Thomson SA (as opposed to other Thomson entities) specifically targeted the  
5 U.S. (as opposed to other countries). Mot. at 9 and 10. Thomson SA’s argument is inaccurate  
6 and ignores both the DAPs’ allegations and the evidence.

7 As described *supra* and in detail in the Complaint, the DAPs allege and show that  
8 “Thomson SA” controlled the prices that Thomson Consumer offered its customers in the U.S.  
9 Best Buy Compl. ¶ 29 (detailing Thomson SA’s involvement in planning and purchasing  
10 discussions with U.S. CRT customers); Loh Decl. Ex. W (email stating that Thomson Consumer  
11 pricing deviations had to be submitted to Thomson SA executive Mr. Lissorgues and  
12 approved by both Messrs. Lissorgues and Lecoq, and attaching a spreadsheet discussing  
13 “NAFTA production”).

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Compl. ¶¶ 30, 151,  
152 (noting the European Commission fined Thomson SA €38.6 million for participating in a  
conspiracy that “operated worldwide”).

Thomson SA also participated in the conspiracy to orchestrate agreements about U.S.  
CRT sales.



These meetings all took place while North America was the world's largest market for CRT televisions and computer monitors. *See* Compl. ¶ 184.

None of Thomson SA's declarations refute these allegations. All four are phrased in the present tense and therefore do not speak to what occurred during the conspiracy period. *See, e.g.,* Rose Decl. ¶ 4 ("Thomson [SA] owns all of the stock of Thomson, Inc ..."); Cadieux Decl. ¶ 20 ("Thomson S.A. does not control the day-to-day activities of Thomson Consumer ..."); Debon Decl. ¶ 6 ("Thomson S.A. does not direct or advise Thomson Inc. on how to sell or distribute any Thomson Inc. product in the United States ..."); O'Hara Decl. ¶ 6 ("Thomson Inc. controls its day-to-day activities."); *see also Steel v. U.S.*, 813 F.2d 1545, 1549 (9th Cir. 1987) ("courts must examine the defendant's contacts with the forum at the time of the events underlying the dispute when determining whether they have jurisdiction"). Further, Thomson SA's earliest declaration is dated September 2, 2005, which is after Thomson SA's sale of its CRT business to Videocon in July 2005. Debon Decl.; Compl. ¶ 27.

Thomson SA also does not offer any credible explanation for why it participated in the above-referenced meetings. Thomson SA merely points to various meetings – none of which the DAPs refer to above – to argue that because they occurred in Europe where Thomson SA is headquartered, "it is equally, if not more, plausible that these alleged meetings related to the European CRT operations of these subsidiaries ...." Mot. at 9. This logic, however, ignores the fact that the DAPs expressly alleged that the meetings concerned the U.S. CRT market. It also ignores the fact that Thomson SA was the "biggest seller of televisions in the U.S.," and that more than half of its net sales were derived there. Loh Decl. Ex. V. Regardless, Thomson SA's plausibility argument is not evidence and, even if it were, the Court must resolve all conflicts in



1 the DAPs' favor. *Fiore v. Walden*, 688 F.3d 558, 574-575 (9th Cir. 2012).

2 Thomson SA's cited authority is also inapposite. It cannot rely on *DRAM* (Mot. at 9-10),  
 3 for instance, because there the plaintiffs failed to "offer any evidence that defendants knew that  
 4 *DRAM* products related to them would reach the forum states ...." 2005 U.S. Dist. LEXIS 30299  
 5 at \*21 (N.D. Cal. Nov. 7, 2005). Likewise, the *DRAM* plaintiffs did not allege that defendants'  
 6 conspiratorial acts targeted plaintiffs whom defendants knew to be residents of the forum. *Id.* at  
 7 \*20. In stark contrast to *DRAM*, the DAPs allege that Thomson SA partook in a conspiracy; that  
 8 the conspiracy's purpose and effect was to fix, raise, stabilize, and maintain the prices for CRTs;  
 9 and that the conspiracy targeted the U.S. Best Buy Compl. ¶¶ 1, 4, 27, 29, 30, 151-54. Also, as  
 10 discussed above, the evidence demonstrates that Thomson SA purposefully directed its  
 11 anticompetitive conduct at the U.S. market. *DRAM* is thus inapposite. See, e.g., *In re TFT-LCD*  
 12 *(Flat Panel) Antitrust Litig. (Electrograph)*, 2012 U.S. Dist. LEXIS 12063 at \*40 (distinguishing  
 13 *DRAM* on the evidence).

14 Thomson SA's other cited case, *Holland America Line, Inc. v. Wartsila North America,*  
 15 *Inc.*, 485 F.3d 450 (9th Cir. 2007), is also unpersuasive. There, the plaintiff argued that the  
 16 defendants agreed to a forum-selection clause that the plaintiff included in its purchase orders.  
 17 The court rejected the plaintiff's assertion because the plaintiff merely alleged that "it conveyed  
 18 the form terms (including the forum selection clause) to an unidentified email address ending in  
 19 @wartsila.com, and that the Wartsila entities had notice of the terms because they appear on  
 20 [plaintiff's] website." *Id.* at 458.

21 ***B. This Action Arises Out Of and Relates to Thomson SA's Conduct.***

22 The Ninth Circuit uses a "but for" test to determine whether a plaintiff's action arises out  
 23 of and relates to a defendant's conduct. *Ballard*, 65 F.3d at 1500; *Learjet*, 715 F.3d at 742;  
 24 *Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 894 (9th Cir. 1996). Thomson  
 25 SA does not even attempt to deny that this action arises out of its misconduct. And for good  
 26 reason: but for Thomson SA's anticompetitive conduct, the DAPs would not have sustained any  
 27 damage. Thus, the DAPs meet the second prong here. See *In re TFT-LCD (Flat Panel) Antitrust*  
 28 *Litig. (MetroPCS)*, 2011 U.S. Dist. LEXIS 131809 at \*15 (finding plaintiff's claim that it paid

1 artificially high prices for LCDs related directly to defendant's conspiratorial activities).

2 **C. The Exercise of Personal Jurisdiction over Thomson SA is Reasonable.**

3 Thomson SA fails to present a "compelling case that the exercise of jurisdiction would  
4 not be reasonable." *Menken v. Emm*, 503 F.3d 1050, 1057 (9th Cir. 2007). Courts generally  
5 look to seven factors to determine reasonableness: (1) the extent of the defendant's purposeful  
6 interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict  
7 with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the  
8 dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the  
9 forum to plaintiff's interest in convenient and effective relief; and (7) the existence of an  
10 alternative forum. *Walden*, 688 F.3d at 582-583.

11 **Purposeful interjection.** This factor looks at the degree to which the defendant has  
12 aimed its activities at the forum. *Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir.  
13 1998). As described above, Thomson SA participated in conspiratorial conduct directed at the  
14 U.S. CRT market. Moreover, Thomson SA's participation was substantial, as evidenced by the  
15 fact that it was the "biggest seller of televisions in the U.S.," regularly had more than half of its  
16 net sales come from the U.S., and generated €10.2 billion from the U.S. in 2002 alone. Loh  
17 Decl. Ex. V. Thus, this factor weighs in favor of jurisdiction.

18 **Burden.** To satisfy this element, Thomson SA must show that the "inconvenience is so  
19 great as to constitute a deprivation of due process." *Panavision*, 141 F.3d at 1323 (internal  
20 quotation marks omitted). It cannot do so here.

21 Thomson SA argues that litigating this case in the U.S. "would impose a significant  
22 burden" because all of its evidence and percipient witnesses reside in France. *See* Mot. at 11.  
23 But as the Ninth Circuit has explained, "the advent of modern transportation certainly has made  
24 the burden of defending in a foreign forum more palatable." *Ballard v. Savage*, 65 F.3d 1495,  
25 1501 (9th Cir. 1995). Moreover, Thomson SA has prosecuted substantial and lengthy litigation  
26 in the U.S. Loh Decl. Exs. Y and L; *Thomson S.A. v. Quixote Corp.*, 979 F. Supp. 286 (D. Del.  
27 1997), *aff'd*, 166 F.3d 1172 (Fed. Cir. 1999); *see also Trueposition, Inc. v. Sunon, Inc.*, No. 05-  
28 3023, 2006 WL 1686635, at \*9 (E.D. Pa. June 14, 2006) ("Based on [defendant's] prior

1 involvement in litigation in the United States, the Court cannot conclude that [defendant] would  
2 be heavily burdened by defending the instant litigation in Pennsylvania”).

3 Thomson SA also cannot rely on the French “blocking statute” it cites. Mot. at 11. The  
4 case it relies on is inapposite as it does not address whether the “blocking statute” precludes  
5 jurisdiction. *See In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 356 (D. Conn. 1991)  
6 (discussing “blocking statute” in context of The Hague Convention). Moreover, other French  
7 litigants regularly participate in U.S. discovery despite this provision. *See Anderson v. Dassault*  
8 *Aviation*, 361 F.3d 449, 453-54 (8th Cir. 2004); *Commissariat A L’Energie Atomique v. Chi Mei*  
9 *Optoelectronics Corp.*, 395 F.3d 1315, 1323-24 (Fed. Cir. 2005); *Societe Civile Succession*  
10 *Richard Guino v. Beseder Inc.*, 2007 U.S. Dist. LEXIS 83782 at \*32-33 (D. Ariz. Oct. 30, 2007).

11 **Conflicts.** If conflicts with a foreign sovereignty were dispositive, they would always  
12 preclude suit against a foreign national in a U.S. court. *Gates Learjet Corp. v. Jensen*, 743 F.2d  
13 1325, 1333 (9th Cir. 1984). Sovereignty considerations “weigh less heavily” when the defendant  
14 manifests an intent to serve and benefit from the U.S. market. *Sinatra v. Nat’l Enquirer, Inc.*,  
15 854 F.2d 1191, 1200 (9th Cir. 1988); *DFSB Kollektive Co., Ltd. v. Bing Yang*, 2013 U.S. Dist.  
16 LEXIS 46096 at \*25 (N.D. Cal. Mar. 28, 2013). As discussed above, Thomson SA manifested  
17 that intent here. Thus, this factor weighs in favor of jurisdiction.

18 **U.S. interest/efficiency/plaintiffs’ choice.** The U.S. is interested in trying violations of  
19 its antitrust laws and injuries to its residents. The Northern District of California will also be the  
20 most efficient forum and is critical to affording the DAPs convenient and efficient relief. This  
21 Court has already presided over this litigation for several years and is familiar with the facts and  
22 issues that will need to be addressed. These factors therefore weigh in favor of jurisdiction.

23 **Alternative forum.** Thomson SA fails to even attempt to argue that there is an  
24 alternative forum. Because the burden is on Thomson SA, this factor weighs in favor of  
25 jurisdiction. In any event, it is unlikely that the DAPs’ claims could be tried in any other forum.  
26 *See Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1136 (D.D.C. 1983)  
27 (noting that foreign courts may decline to hear cases involving American antitrust law).

28 In short, Thomson SA has not established—and cannot establish—a “compelling case”

1 that the exercise of jurisdiction over it would be unreasonable.

2 **II. IN THE ALTERNATIVE, THE COURT SHOULD PERMIT PLAINTIFFS TO**  
 3 **CONDUCT JURISDICTIONAL DISCOVERY.**

4 The DAPs submit that Thomson SA's motion should be denied based upon the record  
 5 before the Court. Should the Court find otherwise, however, the DAPs respectfully request that  
 6 they be permitted to conduct jurisdictional discovery. A plaintiff need only show "some  
 7 evidence" of jurisdiction in order to obtain discovery. *eMag Solutions, LLC v. Tada Kogyo*  
 8 *Corp.*, 2006 U.S. Dist. LEXIS 94462 at \*10 (N.D. Cal. Dec. 21, 2006). The DAPs have shown  
 9 far more than "some evidence" that jurisdiction is appropriate. However, should the Court  
 10 nonetheless conclude that this evidence is insufficient, it should grant the DAPs the opportunity  
 11 to develop a "more satisfactory showing of the facts." *See Laub v. U.S. Dep't of Interior*, 342  
 12 F.3d 1080, 1093 (9th Cir. 2003); *Circle Click Media LLC v. Regus Mgmt. Grp. LLC*, 2013 U.S.  
 13 Dist. LEXIS 1604 at \*13-14 (N.D. Cal. Jan. 3, 2013) (Conti, J.) (granting jurisdictional discovery  
 14 to evaluate agency jurisdiction).<sup>5</sup>

15 **III. THE DAPS' CLAIMS ARE TIMELY BECAUSE THE LIMITATIONS PERIOD HAS**  
 16 **BEEN TOLLED.**

17 The DAPs' claims are timely because the limitations period has been tolled by a  
 18 combination of three tolling doctrines. The DAPs allege in their complaints that Thomson SA  
 19 fraudulently concealed the conspiracy, thus tolling the statute of limitations until the DAPs  
 20 became aware of the conspiracy when it became public at the end of 2007. *Conmar Corp. v.*  
 21 *Mitsui & Co., Inc.*, 858 F.2d 499, 502 (9th Cir. 1988). Additionally, the DAPs' claims were  
 22 tolled pursuant to the class-action tolling doctrine set forth in *American Pipe & Constr. Co. v.*  
 23 *Utah*, 414 U.S. 538, 554 (1974). The *American Pipe* doctrine tolled the limitations period  
 24 starting from at least January 2008 through March 2009, when Thomson SA was named as a  
 25 defendant in the original CRT class action complaints. Furthermore, in February 2009, the  
 26 limitations period was again tolled pursuant to 15 U.S.C. § 16(i), when federal grand juries

27 \_\_\_\_\_  
 28 <sup>5</sup> The DAPS reserve the right to assert general personal jurisdiction arguments should jurisdictional  
 discovery provide a basis to do so.

1 began returning indictments against individuals for participating in the conspiracy. BrandsMart  
 2 FAC ¶ 9. Government actions relating to the CRT conspiracy remain ongoing, and so the  
 3 limitations period remains tolled. 15 U.S.C. § 16(i).

4 Accordingly, through a combination of these tolling doctrines, the limitations period has  
 5 not run and the DAPs' claims remain timely. *See Mt. Hood Stages, Inc. v. Greyhound Corp.*,  
 6 555 F.2d 687, 698 n.26 (9th Cir. 1977).

7 ***A. Thomson SA and its Co-Conspirators Fraudulently Concealed the Conspiracy.***

8 First, as this Court has concluded multiple times in this litigation, "it is generally  
 9 inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to  
 10 dismiss stage, particularly when the proof relating to the extent of the fraudulent concealment is  
 11 alleged to be largely in the hands of the alleged conspirators." *In re CRT Antitrust Litig.*, 2013  
 12 WL 4505701, at \*4 (N.D. Cal. Aug. 31, 2013) ; *In re CRT Antitrust Litig.*, 738 F. Supp. 2d 1011,  
 13 1024 (N.D. Cal. 2010). There is no reason for a different result here.

14 The DAPs have more than adequately alleged that the statute of limitations on the DAPs'  
 15 claims was tolled until November 2007 by Thomson SA and its co-conspirators' fraudulent  
 16 concealment of the price-fixing conspiracy. In order to toll the limitations period based on  
 17 fraudulent concealment, a plaintiff must show that defendants actively concealed the conspiracy,  
 18 and that plaintiff had neither actual nor constructive knowledge of the facts giving rise to its  
 19 claim, despite its diligence in trying to uncover those facts. *Conmar*, 858 F.2d at 502.

20 The DAPs allege in detail how Defendants affirmatively misled their customers and the  
 21 public into believing that CRT prices were governed by market forces, rather than Defendants'  
 22 collusion. The complaints explain how Defendants carried out the conspiracy through "secret  
 23 meetings [and] surreptitious communications . . . in order to prevent the existence of written  
 24 records." *E.g.*, BrandsMart FAC ¶¶ 221. Defendants agreed to "give pretextual reasons for price  
 25 increases and output reductions to the customers," *id.* ¶ 225, by, for instance, blaming a 2004  
 26 price increase "on a shortage of glass shells use[d] for manufacturing CRT monitors." *Id.* ¶ 228.  
 27 In addition, when Defendants' top executives attended conspiracy meetings, they "agreed to  
 28 stagger their arrivals and departures at such meetings to avoid being seen in public with each

1 other.” *Id.* ¶ 222. The Court has already analyzed fraudulent concealment allegations that are  
 2 essentially identical to those the DAPs have made here, and concluded that they “are sufficient to  
 3 deny” this type of motion. *In re CRT*, 738 F. Supp. 2d at 1025.


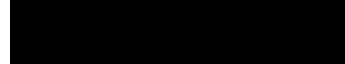
4 ***B. The DAPs’ Fraudulent Concealment Allegations Are More than Adequate.***

5 Thomson SA also contends that the DAPs’ fraudulent concealment allegations are  
 6 insufficient because they do not state with particularity (1) Thomson SA’s direct involvement in  
 7 the concealment of the conspiracy, (2) concealment conduct that may be imputed to Thomson  
 8 SA, or (3) the DAPs’ specific acts of diligence in attempting to uncover their claims. This  
 9 argument fails on all counts.

10 **1. The DAPs’ complaints allege that Thomson SA directly participated in**  
 11 **concealing the conspiracy.**

12 While not required for a finding of fraudulent concealment, the DAPs’ complaints do  
 13 contain specific allegations as to Thomson SA’s involvement in the cover-up of the conspiracy.

14 For example, the DAPs allege that, 

15   
 16  The complaints further state that Thomson SA attended numerous  
 17 bilateral and multilateral meetings, including green meetings. *See id.* ¶¶ 152. The complaints  
 18 then allege in depth how the conspirators used these meetings to carry out and conceal the  
 19 conspiracy. *See id.* ¶¶ 125-81, 238-39. Thus, the complaints set forth detailed examples of  
 20 Thomson SA’s direct participation in Defendants’ fraudulent concealment.

21 **2. The fraudulent concealment conduct of Thomson SA’s co-conspirators is**  
 22 **attributable to Thomson SA for tolling purposes, regardless of its purported**  
 23 **withdrawal from the conspiracy.**

24 Thomson Consumer contends that the Court should rule on a motion to dismiss that it  
 25 withdrew from the conspiracy. In any event, this Court has already rejected similar arguments as  
 26 to withdrawal, commenting that self-serving suggestions that defendants “withdrew from the  
 27  
 28

1 alleged conspiracy . . . raise[] factual questions inappropriate for resolution at the motion-to-  
 2 dismiss stage.” *In re CRT*, 738 F. Supp. 2d at 1025. In addition to having alleged Thomson  
 3 SA’s direct participation in Defendants’ fraudulent concealment, the DAPs also set forth detailed  
 4 allegations of fraudulent concealment by other conspirators that can be imputed to Thomson SA.  
 5 *See id.* ¶¶ 236-43. The law is clear that steps taken by Thomson SA’s co-conspirators to conceal  
 6 the price-fixing conspiracy can be imputed to Thomson SA. *See Riddell v. Riddell Wash. Corp.*,  
 7 866 F.2d 1480, 1493 (D.C. Cir. 1989); *see also Beltz Travel Serv., Inc. v. Int’l Air Transport*  
 8 *Ass’n*, 620 F.2d 1360, 1367 (9th Cir. 1980); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 538  
 9 (6th Cir. 2008). In pleading fraudulent concealment of a global conspiracy involving numerous  
 10 defendants, detailed defendant-by-defendant allegations are not required. As the former Special  
 11 Master in this action previously held:

12 Defendants’ motions emphasize[] that plaintiffs have not alleged fraudulent  
 13 concealment on a defendant-by-defendant basis. . . .

14 It is one thing to compel the plaintiffs to plead that each defendant is a part of the  
 15 conspiracy. It is another to require the plaintiffs to plead facts as to what each  
 16 defendant did within the conspiracy, including concealment. And indeed, such a  
 17 requirement would be contrary to a general principle of conspiracy law that once  
 18 a party becomes a member of a conspiracy he is bound by all of the acts of the  
 other conspirators. . . . [A]pplication of the pleading requirements for fraudulent  
 concealment must recognize that by their very nature the acts of fraudulent  
 concealment would not be readily apparent to even a diligent investigation by  
 plaintiffs, and particularly not in the details of which defendants did what in order  
 to conceal.

19 *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07-5944, 2010 WL 9543295, at \*10 (N.D.  
 20 Cal. Feb. 5, 2010), *R&R adopted by* 738 F. Supp. 2d 1011. The only Ninth Circuit case that  
 21 Thomson SA cites to the contrary did not involve a conspiracy or co-conspirator imputation. *See*  
 22 *Mot. at 19* (citing *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995)).

23 Furthermore, so long as the conspiracy remains concealed, the limitations period remains  
 24 tolled as to all conspirators, regardless of when their individual participation in the conspiracy  
 25 terminated. *See In re Rubber Chem. Antitrust Litig.*, 504 F. Supp. 2d 777, 789-90 (N.D. Cal.  
 26 2007) (holding that the statute of limitations began to run for claims against a defendant as of the  
 27 date the conspiracy was actually disclosed, not the date of the defendant’s withdrawal from the  
 28 conspiracy). Thomson SA cannot escape liability for a conspiracy in which it participated and



1 which it fraudulently concealed merely by withdrawing before it was made public.

2 Finally, Thomson SA asserts that the DAPs cannot toll the statute of limitations beyond  
 3 2004 because the last dated act of fraudulent concealment alleged in the complaints occurred in  
 4 2004. Mot. at 20. This argument not only ignores numerous post-2004 allegations in the  
 5 complaints, but is also a fundamental misstatement of the law. First, the DAPs specifically  
 6 allege that Thomson SA, acting through Videocon, continued to fraudulently conceal the  
 7 conspiracy from 2005 through 2007. *See, e.g.*, Electrograph FAC ¶¶ 152, 156-58. Indeed, the  
 8 complaints allege that [REDACTED]

9 [REDACTED]  
 10 [REDACTED] *Id.* ¶ 156. And from  
 11 2005 through 2007, “Videocon participated in several glass meetings and multiple bilateral  
 12 meetings with its competitors.” *Id.* ¶ 156. Such meetings were “organized . . . to avoid  
 13 detection,” were held “in secret” and were used in part to “orchestrate the giving of pretextual  
 14 reasons for their pricing actions and output restrictions.” *Id.* ¶ 234.

15 Second, there is no requirement that plaintiffs allege the dates of each act of concealment  
 16 to mark the beginning and end of the concealment period. Rather, to satisfy the pleading  
 17 standard of Rule 9(b), a plaintiff need only use some “means [which] inject[s] precision and  
 18 some measure of substantiation into their allegations of fraud.” *In re Elec. Carbon Prods.*  
 19 *Antitrust Litig.*, 333 F. Supp. 2d 303, 315 (D.N.J. 2004) (quoting *Lum v. Bank of Am.*, 361 F.3d  
 20 217, 224 (3d Cir. 2004)); *see also In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1028 (N.D.  
 21 Miss. 1993) (rejecting defendants’ contention that the dates and locations of each act of  
 22 fraudulent concealment must be pleaded, particularly in light of the fact that “the proof is largely  
 23 in the hands of the alleged conspirators’’)). Here, the DAPs have alleged with particularity the  
 24 means of concealment, the parties involved, the contents of numerous documents describing and  
 25 encouraging the concealment, and the dates of several such documents. Electrograph FAC ¶¶  
 26 125-81, 234-43. These allegations are more than sufficient to inject particularity into the DAPs’  
 27 fraudulent concealment pleadings.

28 In arguing otherwise, Thomson SA relies on *In re Urethane*, 663 F. Supp. 2d 1067, 1078-



79 (D. Kan. 2009), which is not persuasive here for two reasons. First, that case has apparently never been cited for the point for which Thomson SA cites it. Second, the issue in that case was when the defendants' fraudulent concealment began, not when it ended. 663 F. Supp. 2d at 1078. Even assuming that the DAPs only alleged concealment activities through 2004, such activities were clearly enough to keep the conspiracy hidden up through 2007.

3. **In light of Thomson SA's active concealment of the conspiracy, DAPs have adequately alleged their diligence.**

Thomson SA erroneously asserts that the DAPs' allegations are insufficient because they do not specifically plead the DAPs' attempts to uncover their claims. To the contrary, a party has an obligation to plead specific acts of diligence only where there are publicly available facts "that would excite the inquiry of a reasonable person." *Conmar*, 858 F.2d at 504.<sup>6</sup> Here, Thomson SA and its co-conspirators actively and successfully prevented such facts from being disclosed to the public until government investigations began in November 2007. Accordingly, the DAPs' allegations that "they had neither actual nor constructive knowledge of the facts supporting [their] claim for relief despite their diligence in trying to discover the facts," until November 2007, are sufficient. *See, e.g.*, *Electrograph FAC* ¶ 232; *see also In re Rubber Chem. Antitrust Litig.*, 504 F. Supp. 2d at 788 (finding similar allegations adequate because the pleaded facts of concealment, if true, "would not give rise to any information that would excite the inquiry of a reasonable person," and "Plaintiffs are not under a duty continually to scout around to uncover claims which they have no reason to suspect they might have.").

C. ***American Pipe Tolled the DAPs' Claims from At Least January 2008 until March 2009.***

As Thomson SA concedes, the DAPs' claims against Thomson SA were tolled under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), from at least January 2008

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<sup>6</sup> Thomson SA cites *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 120 (9th Cir. 1980) for its proposition that a plaintiff must plead specific acts of diligence. Mot. at 19. This case does not support Thomson SA's contention. In that case, unlike the present one, the plaintiff failed to plead *any* facts supporting fraudulent concealment. *See Conerly*, 623 F.2d at 121 ("[The complaint] does not allege any facts, however, tending to excuse his failure to discover Westinghouse's misconduct for a period of twenty-four years.").

1 through March 2009. Mot. at 20-21.<sup>7</sup> However, contrary to Thomson SA's assertions, Mot. at  
 2 21, *American Pipe* tolling also applies to several of the DAPs' state law claims. *American Pipe*  
 3 applies in states that have adopted cross-jurisdictional tolling. See *In re Linerboard Antitrust*  
 4 *Litig.*, 223 F.R.D. 335 (E.D. Pa. 2004). There is an interest in cross-jurisdictional tolling "[i]n  
 5 the antitrust context, [because] declining to adopt cross-jurisdictional class action tolling will  
 6 invite the filing of numerous protective, duplicative and in many cases, unnecessary, suits by  
 7 class members that want to consider filing claims under state antitrust law not included in a  
 8 federal class action complaint." *Id.* at 346 (citation omitted). In any event, independent of the  
 9 federal interest involved, several of the states under whose laws the DAPs have brought claims  
 10 would apply cross-jurisdictional tolling here.<sup>8</sup>

11 ***D. Government Action Tolloed the DAPs' Claims from February 2009 until Today.***

12 The limitations period for the DAPs' claims was tolled again starting in February 2009  
 13 because of actions instituted by the United States Department of Justice relating to the CRT  
 14 conspiracy. By statute,

15  
 16 <sup>7</sup> For the reasons set forth in the DAPs' opposition to Thomson Consumer's motion to dismiss,  
 17 the DAPs further assert that *American Pipe* tolled the DAPs' claims from November 2007  
 18 through November 2011. See Dkt. No. 2377-3 at 13-15.

18 <sup>8</sup> **California:** See *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009) (applying California  
 19 doctrine of equitable tolling based on class action filed in other jurisdiction); **Florida:** See  
 20 *Barneby v. E.F. Hutton & Co.*, 715 F. Supp. 1512, 1528-29 (M.D. Fla. 1989) ("American Pipe  
 21 tolling is properly extended" where Florida state law claims "involve the same 'evidence,  
 22 memories, and witnesses' as are involved in the putative class action [in Indiana federal  
 23 court]."); **Kansas:** See *Seaboard Corp. v. Marsh Inc.*, 284 P.3d 314, 327-28 (Kan. 2012)  
 24 (applying Kansas savings statute on a cross-jurisdictional basis and holding that plaintiff's claim  
 25 was timely filed because it was a putative plaintiff in a federal class action based on claims  
 26 arising out of the same conduct, transaction, or occurrence); **Massachusetts:** See *Arivella v.*  
 27 *Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 180 (D. Mass. 2009) (class action tolling should be  
 28 interpreted with the goal of reducing multiplicity of actions, even if the individual plaintiff's  
 claims are not identical to those asserted in the class complaint); **Michigan:** See *Lee v. Grand Rapids Board of Education*, 148 Mich. App. 364, 384 N.W.2d 165 (Mich. 1986) ("We conclude ... that the federal district court action tolled the operation of the statute of limitations as to plaintiffs' claims pursuant to the Elliott-Larsen Civil Rights Act and the Michigan State Fair Employment Practices Act."); **Minnesota:** See *Jenson v. Allison-Williams Co.*, 1999 U.S. Dist. LEXIS 22170, \*18-19 (S.D. Cal. Aug. 23, 1999) (holding that federal class action tolled state law claim under Minnesota Securities Act, and citing to *Carson v. Independent School Dist. No. 623*, 392 N.W.2d 216, 223 (Minn. 1986) and *Bartlett v. Miller and Schroder Municipals, Inc.*, 355 N.W.2d 435, 439-440 (Minn. Ct. App. 1984)); **New York:** *Williams v. Dow Chem. Co.*, No. 01-cv-4307, 2004 WL 1348932, at \*12 (S.D.N.Y. June 16, 2004) ("New York would likely apply *American Pipe*" in a cross-jurisdictional context).

[w]henver any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect to every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . .”

15 U.S.C. § 16(i). As such, the DAPs’ four-year limitations period against Thomson SA was tolled on February 10, 2009, and remains tolled today. On February 10, 2009, a federal grand jury indicted C.Y. Lin of Chunghwa for his involvement in conspiracies fixing the prices of CDTs and CPTs. BrandsMart FAC ¶ 185. The indictment, as described in a DOJ press release, charges that C.Y. Lin conspired with others “to fix the prices of two types of CRTs used in computer monitors and televisions.” *Id.* The DOJ subsequently indicted five other Korean and Taiwanese executives who participated in the conspiracy. *Id.* ¶¶ 186-89.<sup>9</sup> All of these actions remain pending.

Tolling pursuant to Section 16(i) commenced when the first indictment issued, and the DAPs’ claims will remain tolled throughout the pendency of the government actions. *Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867, 868 (9th Cir. 1978). In *Dungan*, the Ninth Circuit determined that “[t]he date of the return of the indictment fits comfortably within the statutory language” of § 16(i) requiring that proceedings be ‘instituted.’ In discussing *Dungan*, Thomson SA asserts that courts must ‘strike the exquisite balance’ in applying § 16(i). Mot. at 21. In fact, the court reached the exact opposite conclusion. The court specifically did not want to leave the question of what qualifies as ‘instituting’ proceedings to a case-by-case determination, noting that “considerable judicial time would be consumed in *striking the exquisite balance* between serving the objects of grand jury secrecy on the one hand and those of section 16(i) . . . on the other.” 570 F.2d at 871 (emphasis added). Accordingly, because grand juries began indicting CRT executives in 2009, the limitations period for the DAPs’ claims against Thomson SA has been tolled since that time.

Thomson SA first argues that tolling would not serve the purposes of 15 U.S.C. § 16(i)

<sup>9</sup> See *United States v. Cheng*, No. 09-cr-00836 (N.D. Cal. Aug. 18, 2009); *United States v. Yeh*, No. 10-cr-00231 (N.D. Cal. Mar. 30, 2010); *United States v. Lee*, No. 10-cr-00817 (N.D. Cal. Nov. 9, 2010).

1 because the government's case against the criminal defendants has not progressed. Mot. at 22.  
 2 Tellingly, Thomson SA cites no legal authority to support its contention that § 16(i) does not  
 3 apply until some point after indictment or requires a court to assess the progress of a criminal  
 4 proceeding. The law is clear that application of § 16(i) does not depend on the success of the  
 5 government's case or on the government's prosecutorial decisions. *See Chipanno v. Champion*  
 6 *Int'l Corp.*, 702 F.2d 827 (9th Cir. 1983); *Hinds Cnty., Miss. v. Wachovia Bank N.A.*, 885 F.  
 7 Supp. 2d 617, 628-29 (S.D.N.Y. 2012). By asserting that the Court should draw the line at  
 8 arraignment or at a certain number of years of fugitive status, Thomson SA is asking the Court to  
 9 engage in the case-by-case process that *Dungan* rightly rejected.

10 Next, Thomson SA asserts that the DAPs' allegations do not sufficiently overlap with the  
 11 allegations in the criminal indictments. To the contrary, the DAPs' claims overlap directly with  
 12 the subject matter of the indictments, and are plainly "based in whole or in part on any matter  
 13 complained of in [a government proceeding]." 15 U.S.C. § 16(i); *see Chipanno* 702 F.2d at 833.  
 14 The Ninth Circuit has held that "consideration of whether a later private suit is 'based in whole  
 15 or in part on any matter complained of' in a prior government action . . . must be limited to a  
 16 comparison of the two complaints on their face." *Chipanno* 702 F.2d at 832. "If the necessary  
 17 overlap is present, the purpose of the statute is served though there are differences in the  
 18 allegations of the two complaints as to the means used, the defendants named, and the time  
 19 period and geographic area involved." *Id.* at 832-33.

20 Here, the DAPs' complaints and the indictment against Mr. Lin each describe a  
 21 conspiracy that includes both CDTs and CPTs. *Compare* BrandsMart FAC ¶ 3 ("CPT Products  
 22 and CDT Products shall be referred to collectively as 'CRT Products'") *with United States v. Lin*,  
 23 No. 09-cr-00131, at 1, 4-5 (N.D. Cal. Feb. 10, 2009) (Dkt. No. 1) (indicting C.Y. Lin for  
 24 conspiracies involving both CDTs and CPTs). Both describe similar methods used in furtherance  
 25 of the conspiracy. *Compare* BrandsMart FAC ¶¶ 111, 122 (describing secret meetings in  
 26 "Taiwan, South Korea, Thailand, Japan, Malaysia, Indonesia and Singapore" where agreements  
 27 were made to set "target prices") *with Lin*, at 5 (meetings were held in "Taiwan, Korea,  
 28 Malaysia, China, Thailand, Indonesia, and elsewhere" where conspirators agreed to "charge

1 prices of CPTs at certain target levels”). Both allege that the conspiracy affected the prices of  
 2 CRTs sold in the United States. *Compare* BrandsMart FAC ¶ 209 (prices for CRTs were “raised,  
 3 fixed, maintained and stabilized at artificially high and noncompetitive levels throughout the  
 4 United States”) *with Lin*, at 4 (conspirators fixed “the prices of [CPTs] to be sold in the United  
 5 States and elsewhere”).

6 With respect to the Lin indictment, Thomson SA argues that its geographic scope  
 7 distinguishes it from the DAPs’ complaints, and it claims that no allegations expressly connect  
 8 the activities of Mr. Lin and Chunghwa to Thomson SA. Mot. at 23. However, even if the  
 9 geographic scope of the complaint differed from the indictment, the overlap between the two  
 10 would still be sufficient. *See Chipanno*, 702 F.2d at 829, 832-33 (tolling subsequent private  
 11 claims which involved a timber market covering a broader geographic area than the  
 12 government’s case); *see also In re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 321 (S.D.N.Y.  
 13 1971) (where a government action in the domestic market tolled a private action even though the  
 14 action involved both domestic and foreign markets). Thomson SA also argues that the overlap  
 15 with respect to the indictments is insufficient because they do not cover CPTs. *See* Mot. at 23.  
 16 This argument is puzzling because Mr. Lin’s indictment specifically covers CPTs. *See Lin*, at 1,  
 17 4-5. And, whether, as Thomson SA argues, the CPT and CDT markets are entirely separate is a  
 18 question of fact that cannot be resolved on a motion to dismiss. *See, e.g., Thurman Indus., Inc. v.*  
 19 *Pay ‘N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989) (defining a product market is a  
 20 “factual inquiry for the jury.”). Even the indictments alleging actions only with respect to CDTs  
 21 provide the overlap necessary to toll the statute of limitations. There is no requirement that the  
 22 markets at issue be “identical.” *See In re Antibiotic Antitrust Actions*, 333 F. Supp. at 321.

#### 23 **IV. THE DOCTRINE OF LACHES DOES NOT BAR THE DAPS’ CLAIMS.**

24 Thomson SA’s argument that laches bars the DAPs’ claims is also meritless. “Laches is  
 25 an equitable time limitation on a party’s right to bring suit.” *Jarrow Formulas, Inc. v. Nutrition*  
 26 *Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002). To prevail on a laches defense, a defendant must  
 27 show (1) the plaintiff unreasonably delayed filing suit, (2) which caused prejudice to the  
 28 defendant. *Id.* Thomson SA cannot establish either element.

As a threshold matter, meeting the standard for a laches defense in a motion to dismiss is a virtually insurmountable task. This Court recognized this high barrier in *Sensible Foods, LLC v. World Gourmet, Inc.*, 2011 WL 5244716 at \*4-5 (N.D. Cal., Nov. 3, 2011) (J. Conti):

In their Motion, Defendants ask the Court to make factual determinations concerning when Plaintiff knew or should have known about the alleged infringement, Plaintiff's diligence in enforcing its rights, and the prejudice to Defendants caused by Plaintiff's alleged delay.... [E]ven if the Court were to take notice of the facts set forth in the parties' requests for judicial notice, it is premature to determine whether such evidence is sufficient to raise a genuine issue of material fact, let alone weigh that evidence.

Accordingly, the Court finds that a determination on the adequacy of Defendants' laches defense ... requires findings of fact and is inappropriate for resolution on a motion to dismiss.

*Sensible Foods*, 2011 WL 5244716 at \*4-5 (internal citations and quotations omitted). Generally, laches defense cannot be resolved in a motion to dismiss, and is rarely susceptible to resolution even by summary judgment. Such factual determinations are inappropriate on a motion to dismiss in this case, and even more so in light of Thomson SA's failure to provide any evidence of the DAPs' lack of diligence. *See, e.g., Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 666-67 (9th Cir. Cal. 1980). Moreover, as discussed below, Thomson SA is unable to establish either unreasonable delay or prejudice.

**A. *The DAPs did not unreasonably delay bringing suit against Thomson SA.***

Where, as here, the DAPs filed their respective actions within the tolled statute of limitations period, there is a "strong presumption" that the timing is reasonable and laches is inapplicable. *Jarrow*, 304 F.3d at 835-36; *see also Aurora Enters v. Nat'l Broad Co.*, 688 F.2d 689, 694 (9th Cir. 1982). Importantly, where the presumption against laches applies, the party asserting laches bears the burden of proof. *In re Katz Interactive Call Processing Patent Litig.*, 882 F. Supp. 2d 1123, 1146 (C.D. Cal. 2010).

**B. *Thomson SA makes no showing of evidentiary or expectations-based prejudice.***

Similarly, Thomson SA makes only conclusory allegations of prejudice. For laches purposes, the Ninth Circuit recognizes two forms of prejudice: evidentiary and expectations-based prejudice. *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1227 (9th Cir. 2012). "Evidentiary prejudice includes such things as lost, stale, or degraded evidence, or



witnesses whose memories have faded, or who have died.” *Id.* (quoting *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001)). A defendant suffers expectations-based prejudice where it “took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly.” *Id.*

**1. Thomson SA has not established evidentiary prejudice.**

Thomson SA cites to *Danjaq*, 263 F.3d at 954, and *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244, 1250 (9th Cir. 1979), for the proposition that faded memories and the degradation of evidence support a finding of evidentiary prejudice. While this proposition is correct, the party asserting laches nonetheless has the burden of demonstrating “that it has suffered prejudice as a result of the plaintiff’s unreasonable delay in filing suit.” *Tillamook Country Smoker, Inc. v. Tillamook Cnty. Creamery Ass’n*, 465 F.3d 1102, 1108 (9th Cir. 2006). In both *Danjaq* and *McCune*, the defendants pointed to specific evidence that had degraded as a result of the plaintiff’s unreasonable delay. *See Danjaq*, 263 F.3d at 955 (noting that most of the key potential witnesses had died); *McCune*, 465 F.3d at 1249-50 (finding prejudice because an eyewitness had died). Here, by contrast, Thomson SA fails to set forth a single piece of evidence that degraded, or name a single witness that would be unavailable, as a result of the DAPs’ purported delay in filing suit. *See Mot.* at 17. Such bald assertions are insufficient to establish evidentiary prejudice. *See In re Beaty*, 306 F.3d 914, 928 (9th Cir. 2002).<sup>10</sup>

**2. Thomson SA has not suffered expectations-based prejudice.**

In the Ninth Circuit, expectations-based prejudice “requires at least some reliance [by the defendant] on the absence of a lawsuit.” *Seller Agency Council, Inc. v. Kennedy Ctr. for Real Estate Educ., Inc.*, 621 F.3d 981, 990 (9th Cir. 2010); *see also Univ. of Pittsburgh v. Champion Prods. Inc.*, 686 F.2d 1040, 1045 (3d Cir. 1982). Thomson SA argues that it will be prejudiced because substantial discovery has already taken place in the pending CRT litigation, and that it

<sup>10</sup> Thomson SA complains that “[m]any of the witnesses Thomson SA needs to prepare its defense no longer work for the company and many CRT-related documents were transferred to Videocon” in 2005. *Mot.* at 17. Notably, no specific witnesses or documents are identified. Moreover, the situation would be no different had the DAPs sued in 2007 when the conspiracy first became known.

1 would struggle to meet the current schedule. Mot. at 15. However, Thomson SA fails to explain  
 2 how this scheduling issue is evidence of its detrimental reliance on not being sued. Notably, it  
 3 does not cite a single case where a court has found expectations-based prejudice due to  
 4 scheduling issues. Finally, as Thomson Consumer concedes, the Court may set a schedule for  
 5 Thomson Consumer separate from the other Defendants.

6 Alternatively, Thomson SA asserts that it would be prejudiced by being placed on a  
 7 separate schedule from the other Defendants because it would be “depriv[ed] . . . of the cost  
 8 efficiencies that have resulted from the joint defense group.” Mot. at 16. Essentially, Thomson  
 9 SA argues that it will be prejudiced by having to bear the ordinary costs of litigation. As such, it  
 10 is no surprise that Thomson SA cites no authority for the idea that it is legally entitled to a joint  
 11 defense group. Thomson SA further claims—again, without any actual authority—that it would  
 12 be prejudiced because “the DAPs will attempt to recover from Thomson SA amounts left  
 13 unsatisfied by settlements or judgments involving other defendants.” *Id.* The timing of a  
 14 defendant’s decision to settle does not establish legal prejudice to other defendants. Tellingly,  
 15 Thomson SA does not cite a single case recognizing expectations-based prejudice for laches in  
 16 this context.

#### 17 **V. THE DAPS HAVE ADEQUATELY ALLEGED ANTITRUST STANDING.**

18 As an initial matter, this Court has already ruled that the DAPs have standing to proceed  
 19 with their federal claims under the ownership or control exception to *Illinois Brick Co. v. Illinois*,  
 20 431 U.S. 720 (1977). The Court has twice rejected Defendants’ arguments to the contrary. Dkt.  
 21 No. 1856 at 5 (denying Defendants’ Joint Motion to Dismiss based upon standing “to the extent  
 22 that [the MTD] challenges the DAPs’ right to proceed under the ownership or control  
 23 exception”); Dkt. No. 1470 at 16 (“The named DPPs are indirect purchasers, but, under *Royal*  
 24 *Printing*, they have standing to sue insofar as they purchased [finished products] incorporating  
 25 the allegedly price-fixed CRTs from an entity owned or controlled by any allegedly conspiring  
 26 defendant.”). The DAPs’ standing has already been established in this case, and Thomson SA  
 27 gives no reason to disturb the Court’s duly and repeatedly considered judgment.

28 Nevertheless, Thomson SA now argues that the DAPs must identify the initial sellers of



1 CRTs and allege that those sellers have an ownership or control relationship with the entities  
 2 from which they bought CRT Products. Mot. at 24 and 25. Thomson SA's motion should be  
 3 denied because the DAPs' allegations are sufficient under Rule 8's notice pleading requirements.  
 4 The DAPs have pled that they "purchased CRT Products directly from the Defendants, and/or  
 5 the Defendants' subsidiaries and affiliates and/or any agents the Defendants or Defendants'  
 6 subsidiaries and affiliates controlled." See, e.g., *Electrograph FAC* ¶ 23. These allegations are  
 7 more than sufficient to put Thomson SA on notice that the DAPs are making claims based upon  
 8 the ownership or control exception to *Illinois Brick*. Moreover, Thomson SA's argument has  
 9 already been rejected in other cases before this Court. See *In re TFT-LCD (Flat Panel) Antitrust*  
 10 *Litig. (Viewsonic)*, 2012 WL 5949585, at \*3 (N.D. Cal. Nov. 28, 2012); *In re TFT-LCD (Flat*  
 11 *Panel) Antitrust Litig. (Best Buy)*, 2013 WL 254873, at \*3-4 (N.D. Cal. Jan. 23, 2013).

12 Thomson SA relies on *In re TFT-LCD (Flat Panel) Antitrust Litig. (Proview)*, No. 07-  
 13 1827, 2013 WL 1164897 (N.D. Cal. Mar. 20, 2013) in an attempt to support its argument, Mot.  
 14 at 24 (citing *In re TFT-LCD (Flat Panel) Antitrust Litig. (Proview)*, 2013 WL 1164897 (N.D.  
 15 Cal. Mar. 20, 2013)), but that decision is entirely inapposite. In the *Proview* case, the plaintiff  
 16 sought to recover for purchases it made from OEMs that it owned and controlled itself. *Id.* at \*3.  
 17 Here, by contrast, it is the Defendants who own and control the entities from which the DAPs  
 18 made purchases, and thus it is Defendants that are in possession of information to prove the  
 19 ownership relationships of these entities. Accordingly, the DAPs are not required to plead this  
 20 information, and Thomson SA's standing argument should be rejected.<sup>11</sup>

### 21 CONCLUSION

22 The DAPs respectfully submit that Thomson SA's Motion should be denied.

23  
 24 Respectfully submitted,

25 DATED: February 10, 2014

26 /s/ David Martinez

27 Roman M. Silberfeld

28 <sup>11</sup> Nevertheless, if the Court determines that additional details are required concerning the DAPs' purchases of CRT Products, the DAPs request leave to amend their complaints to add such details.

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